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Paper No. 27

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**DEC 05 2006**

In re Application of  
Bruce M. Radl  
Application No.: 09/966,484  
Filing or 371(c) Date: 09/28/2001  
Attorney Docket Number: 13076-002001

**OFFICE OF PETITIONS**  
DECISION ON  
PETITION

This is a decision in response to the Petition to Withdraw Notice of Abandonment, filed August 28, 2006. The petition is properly treated under 37 CFR 1.181 (no fee).

This Petition is **dismissed**.

Any further petition for reconsideration must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under [insert the applicable code section]." This is **not** final agency action within the meaning of 5 U.S.C. § 704.

Background

The above-identified application became abandoned for failure to timely and properly reply to the Office communication, mailed May 15, 2006. The Office communication set a two (2) month period for reply. No extensions of time were available.

Applicant asserts that the Office communication was never received. In support of this assertion, Applicant files a copy of the Patent Application Information Retrieval (PAIR) system transactional history and notes that there is no indication therein that the Office communication was mailed to Applicant. Applicant also files the declaration of Applicant's Senior Patent Docketing Specialist attesting to the fact that a check of Applicant's computerized docket system revealed that the Office communication was not entered or docketed, and the electronic mail log contained no record of receiving the Office communication.

Applicable Law, Rules and MPEP

The MPEP 711.03(c)A, Petition To Withdraw Holding of Abandonment Based on Failure To Receive Office Action, provides

In Delgar v. Schulyer, 172 USPQ 513 (D.D.C. 1971), the court decided that the Office should mail a new Notice of Allowance in view of the evidence presented in support of the contention that the applicant's representative did not receive the


original Notice of Allowance. Under the reasoning of Delgar, an allegation that an Office action was never received may be considered in a petition to withdraw the holding of abandonment. If adequately supported, the Office may grant the petition to withdraw the holding of abandonment and remail the Office action. That is, the reasoning of Delgar is applicable regardless of whether an application is held abandoned for failure to timely pay the issue fee (35 U.S.C. 151) or for failure to prosecute (35 U.S.C. 133). To minimize costs and burdens to practitioners and the Office, the Office has modified the showing required to establish nonreceipt of an Office action. The showing required to establish nonreceipt of an Office communication must include a statement from the practitioner stating that the Office communication was not received by the practitioner and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received. A copy of the docket record where the nonreceived Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement. For example, if a three month period for reply was set in the nonreceived Office action, a copy of the docket report showing all replies docketed for a date three months from the mail date of the nonreceived Office action must be submitted as documentary proof of nonreceipt of the Office action. The showing outlined above may not be sufficient if there are circumstances that point to a conclusion that the Office action may have been lost after receipt rather than a conclusion that the Office action was lost in the mail (e.g., if the practitioner has a history of not receiving Office actions). (Emphasis supplied)

MPEP 711.03(c)

#### Analysis

A review of the petition reveals that the correspondence address in the petition differs from the correspondence address of record. As such, it is unclear whether Applicant is in a position to attest on a personal knowledge basis as to whether the office action was received at the correspondence address of record. Also, Applicant has failed to include a copy of the docket record where the nonreceived Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement. Accordingly, the petition to withdraw the holding of abandonment is dismissed.

Telephone inquiries concerning this matter should be directed to the undersigned at (571) 272-3232.



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